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The Jurisdiction of Administrative Appeals in Nebraska: A One-Way Ticket, No Returns, No Transfers in *Metro Renovation, Inc. v. Department of Labor*, 249 Neb. 337, 543 N.W.2d 715 (1996)

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Note

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I. INTRODUCTION

The Nebraska Supreme Court's decision in *Metro Renovation, Inc. v. Department of Labor* drew immediate public response because of the court placed limitations on the precedential value of Nebraska Court of Appeals' decisions.[1] This Note deals with the less controversial first section of the opinion. The first issue discussed in *Metro* concerned whether or not the district court where the case was filed had jurisdiction over the administrative appeal.[2]

In *Metro*, the plaintiff's claim involved an administrative appeal brought under section 84-917 of the Nebraska Code, which confers jurisdiction in only one district court, that is, the court "where the action

1. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 543 N.W.2d 715 (1996). The second section of the case held that decisions of the Nebraska Court of Appeals are not binding precedent regarding legal issues to which the Nebraska Supreme Court has not yet spoken. *Id.*
2. *Id.* at 338-43, 543 N.W.2d at 718-20 (1996).

was taken."[3] *Metro* sets forth a two-part test to determine exactly which administrative actions grant a district court jurisdiction over an administrative appeal.[4] While jurisdictional issues may not always be newsworthy, the practical impact of the *Metro* jurisdictional test can be devastating for certain litigants.

For example, imagine a hypothetical case where local parents want to challenge a school policy at a Scotts Bluff high school. The parents claim that the policy discriminates against female students. These parents bring a request to change the school's policy before the local school board, which denies the request. The parents appeal to the State Board of Education in Lincoln. The request again is denied. The parents' lawyer files an appeal under section 84-917 in the Scotts Bluff County District Court. After reviewing the record, the district court sustains the State Board's determination. The parents then appeal to the Nebraska Supreme Court.

The Nebraska Supreme Court, in turn, dismisses the case for lack of jurisdiction. Why? Because the parents' lawyer incorrectly filed the initial appeal in Scotts Bluff District Court. According to the supreme court's interpretation of section 84-917(2)(a), the appeal initially should have been filed in the Lancaster County District Court, the site of the State Board decision, because this decision was the "action" conferring jurisdiction. The parties are not allowed to waive jurisdiction.[5] The parents cannot refile their appeal because section 84-917(2)(a) allows only 30 days to file an appeal after the State Board's decision.[6] Thus, the decision in this hypothetical case is final.

Sadder but wiser, the lawyer accepts another case involving an administrative appeal. This time the client is challenging a decision by the State Board of Mental Health. The Board conducts a fact-finding hearing in Omaha. The Board's decision is adverse to the client's interests, and the client appeals to the Director of the State Mental Health Board in Lincoln. The Director then affirms the Board's decision. The lawyer confidently files the administrative appeal under section 84-917 in Lancaster County District Court, the location of the appeal determination by the Health Board Director. Unfortunately, this time the Nebraska Supreme Court holds that the appeal should have been filed in the Douglas County District Court in Omaha, where the fact-finding hearing was held. In this hypothetical, the fact-find-

3. "Proceedings for review shall be instituted by filing a petition in the district court where the action was taken within thirty days after the service of the final decision by the agency." NEB. REV. STAT. § 84-917(2)(a) (Reissue 1994).

4. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 340, 543 N.W.2d 715, 719 (1996).

5. Woodsmall v. Marijo, Inc., 206 Neb. 405, 293 N.W.2d 378 (1980).

6. NEB. REV. STAT. § 84-917(2)(a) (Reissue 1994).

ing hearing was the "action" conferring jurisdiction. Again the case is dismissed.

Can the same statute yield such inconsistent results? Unfortunately, the answer is yes. In *Metro,* the Nebraska Supreme Court reaffirmed the rule that jurisdiction of an administrative appeal is proper at "the site of the first adjudicated hearing of a disputed claim."[7] The language of section 84-917(2)(a) itself does not contain the language used by the *Metro* court. Instead, the statute states that the petition to file an administrative appeal shall be filed "in the district court of the county where the action is taken."[8] The statute, however, fails to specify what administrative agency "action" is contemplated.[9] Thus, the Nebraska Supreme Court has stepped in and supplied the definition.

Section 84-917, adopted in 1963, is part of the Administrative Procedure Act, which sets out the judicial processes that apply to state administrative agencies.[10] A common issue when discussing jurisdiction in administrative law is whether an agency is acting within its "jurisdiction" or scope of authority. This Note does not deal with the jurisdiction of the administrative agency, but rather jurisdiction for judicial review of administrative decisions. This Note first will trace the history of the *Metro* jurisdictional test and then will compare the *Metro* test with the Model Administrative Procedure Act and other states' approaches to the jurisdiction of administrative appeals. Next, this Note will explain how the current test is unconstitutional, and will suggest some alternatives to the *Metro* test.

II. JURISDICTION CASES PRIOR TO *METRO*

The Nebraska Supreme Court has been called upon more than once to decide which district court has jurisdiction over an administrative appeal brought under section 84-917.[11] In *Metro,* the supreme court ties together all the previous cases with one consistent rule. Before discussing the facts of *Metro,* however, a brief synopsis of the prior cases will help to set the stage.

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7. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 341, 543 N.W.2d 715, 719 (1996).
8. NEB. REV. STAT. § 84-917(2)(a) (Reissue 1994).
9. *Id.* The entire text of § 84-917 goes on for two pages, but the phrase "where the action was taken" appears only in subsection (2)(a). The phrase does not appear elsewhere in the Administrative Procedure Act. *Id.* §§ 84-901 to 920 (Reissue 1994).
10. *Id.* §§ 84-901 to -920 (Reissue 1994 & Cum. Supp. 1996).
11. *See* Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 323 N.W.2d 89 (1982); Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974); Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 173 N.W.2d 369 (1969).

The first case to raise the question of district court jurisdiction over an administrative appeal was *Flamingo, Inc. v. Nebraska Liquor Control Commission.*[12] After a hearing in Lincoln, the State Liquor Commission suspended Flamingo's liquor license. The plaintiff appealed the Commission's decision under section 53-1,116 of the Nebraska Code.[13] The plaintiff filed his appeal in Dakota County, where he resided. The Commission made a special appearance to object to the jurisdiction of the district court, asserting that jurisdiction was proper only in Lancaster County District Court, where the Commission's action was taken. The plaintiff, on the other hand, asserted that jurisdiction was proper in Dakota County under section 53-1,116, which stated that the Commissioner's decision could be reviewed by "the district court where . . . the licensee resides."[14] The Commission pointed out that section 53-1,116 dealt with license *revocations*, but not license *suspensions*. The Commission argued that because section 53-1,116 did not apply, section 84-917(2)(a) governed the jurisdictional requirements and required an appeal to be filed in the County where the decision, and therefore the action, took place. The Nebraska Supreme Court, agreeing with the Commission, noted that both the hearing and final decision took place in Lincoln. Thus "the action was taken in Lancaster County."[15] The court dismissed the case for lack of jurisdiction.

The second case to raise the jurisdiction question was *Downer v. Ihms.*[16] In *Downer*, the Department of Public Welfare terminated the plaintiff's disability benefits. The Department concluded, after a hearing in Scotts Bluff, that the plaintiff was no longer disabled. In Lincoln, the Director of the Department of Public Welfare affirmed the decision. The plaintiff then filed a petition in error, rather than an administrative appeal, in the District Court of Scotts Bluff, where he resided. In his motion, the plaintiff stated that judicial review under section 84-917 was unavailable to him because financial constraints impeded his ability to file his appeal in Lancaster County, which was a substantial distance from his home in Scotts Bluff, as required under section 84-917(2).[17] The Commission filed a special appearance, as in *Flamingo.*[18] This appearance was sustained by the district court,

12. 185 Neb. 22, 173 N.W.2d 369 (1969).

13. NEB. REV. STAT. § 53-1,116 (Reissue 1943).

14. *Id.*

15. Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 25, 173 N.W.2d 369, 371 (1969).

16. 192 Neb. 594, 223 N.W.2d 148 (1974). The originally named defendant was Lawrence L. Graham, but Alan H. Ihms was later substituted.

17. *Id.* at 597, 223 N.W.2d at 150.

18. Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 23, 173 N.W.2d 369, 370 (1969).

which held that the plaintiff had filed in the wrong district court. The plaintiff appealed to the Nebraska Supreme Court.

The supreme court held that regardless of whether the claim had been brought as a petition in error or as an administrative appeal under section 84-917, jurisdiction was proper in Scotts Bluff. The court turned to the regulations of the Department of Public Welfare to define "where the action was taken" according to section 84-917(2). The court concluded that the Department regulations allowed appeal forms to be filed in the plaintiff's county of residence. Further, the court found that the hearings were conducted in the county of residence and the Director's final order constituted the sole activity conducted outside of Scotts Bluff, the plaintiff's county of residence. Based on these findings, the supreme court concluded that "action was taken" in Scotts Bluff.[19] The case was still dismissed, however, because the plaintiff failed to file the required copy of the record from the Department proceedings with the appeal petition.[20]

The third case is *Keya Paha County High School District v. State Board of Education*.[21] In *Keya Paha*, parents who resided in Nebraska requested that the Nebraska school board pay tuition for their children to attend South Dakota schools. Their request was pursuant to a statute requiring the Keya Paha School Board to pay out-of-state tuition for Nebraska school children, depending on the location of the children's home in relation to the out-of-state school.[22] The school board denied the request and the parents appealed to the State Department of Education in Lincoln. The Department ordered the school district to pay the tuition. The Keya Paha School Board filed an appeal for judicial review under section 84-917 in Keya Paha District Court. The Keya Paha District Court affirmed the Department's order, and the school district appealed to the Nebraska Supreme Court.

The State Board of Education, in an attempt to defend its order, raised the issue of jurisdiction for the first time before the supreme court, asserting that the Keya Paha School District incorrectly had filed its appeal in Keya Paha District Court. The supreme court agreed and dismissed the case for lack of jurisdiction. Noting that jurisdictional issues could be raised at any point in the proceeding by either party or by the court itself,[23] the court held that the "action was taken" in Lincoln, the location where the State Department of Education ordered the Keya Paha School District to pay the tuition. Thus,

19. Downer v. Ihms, 192 Neb. 594, 599-600, 223 N.W.2d 148, 151 (1974).
20. *Id.* at 602, 223 N.W.2d at 152. The statutory requirement referred to is NEB. REV. STAT. § 25-1931 (Reissue 1943).
21. 212 Neb. 448, 323 N.W.2d 89 (1982).
22. NEB. REV. STAT. § 79-1103.05 (Reissue 1976).
23. Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 451, 323 N.W.2d 89, 91 (1982).

the proper place to file was the Lancaster County District Court, not the Keya Paha District Court. No other statute or Department regulation further specified jurisdictional requirements for appeals from State Board of Education orders beyond those defined in section 84-917. The court quoted its opinion in *Downer*, stating that, as applied to the Board of Education, the site of "the first adjudicated hearing of a disputed claim" is the action that confers jurisdiction.[24]

III. THE JURISDICTIONAL HOLDING IN *METRO*

Metro is the fourth Nebraska Supreme Court case discussing section 84-917(2)(a). The case concerned the employment status of certain carpenters working for Metro Renovation.[25] The company employed two types of carpenters in its work—employees and independent contractors. The carpenters who were considered employees were paid an hourly wage. These carpenters were eligible for coverage under the company insurance policy, worker's compensation, and unemployment insurance. The second group of carpenters were considered independent contractors. The contractors submitted biweekly invoices to the company. Metro Renovation paid these invoices without deducting taxes or paying unemployment insurance premiums.

The Commissioner of the Department of Labor appointed a hearing officer to investigate whether all the carpenters employed by Metro Renovation were, in fact, employees. The officer held a hearing in Omaha (Douglas County), conducted an investigation, made findings of fact, and submitted a three page recommendation to the Commissioner. Based on this report by the hearing officer, the Department of Labor found Metro Renovation liable for unemployment contributions based on the wages of the workers who incorrectly had been designated independent contractors by the company.[26] The company then filed an appeal for administrative review under section 84-917 in Douglas County District Court. The district court reversed the Department of Labor's determination and held instead that none of the carpenters in question were employees of Metro Renovation. The Department appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court then removed the case from the court of appeals to the supreme court's docket.[27] The Department argued before the supreme court that the case should be dismissed because the Douglas County Court lacked jurisdiction over the appeal. The supreme court disagreed.

24. *Id.* at 453-54, 323 N.W.2d at 92.
25. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 338-40, 543 N.W.2d 715, 718 (1996).
26. *Id.*
27. *Id.* at 340, 543 N.W.2d at 719.

The jurisdiction cases prior to *Metro* arguably indicate that unless the agency is governed by a statute that specifies where a particular type of appeal can be brought, as in *Downer*,[28] the supreme court tends to find jurisdiction where the last step in the administrative agency's process was fulfilled, as in *Flamingo*[29] and *Keya Paha*.[30] This interpretation also would fit within the overall language of the statute. Section 84-917(1) allows a party to appeal only a "*final decision* in a contested case."[31] The language in section 84-917(2)(a) supports this construction, requiring that the claim be filed "where the action was taken . . . after . . . the *final decision* by the agency."[32] This language at least implies that the "action taken" is the final decision by the agency, unless a specific appeal scheme in statutes or regulations governs the specific agency.

In *Downer* and *Metro*, however, the court pointed out that the Lancaster County District Court does not automatically have jurisdiction over an administrative appeal.[33] Instead, determining where to file an administrative appeal requires a careful assessment of the entire administrative process regarding a particular claim. The court undertook this jurisdictional assessment in *Metro* and looked for (1) the first adjudicated hearing of (2) a disputed claim.

Providing examples for guidance, the court applied the *Metro* two-part test to the facts of the prior jurisdiction cases. The court described the State Board of Education's decision to order the Keya Paha School District to pay tuition as an adjudicated hearing of a disputed claim.[34] Likewise, the intermediate hearings conducted by the Department of Public Welfare[35] and the State Liquor Commission qualified as adjudicated hearings of disputed claims.[36]

The Nebraska Supreme Court has not yet precisely defined what constitutes an adjudicated hearing. The Administrative Procedure Act defines some terms used in section 84-917, such as "contested case" and "final decision."[37] The statute, however, is void of language defining the phrase "where the action was taken" and therefore leaves

28. Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974).
29. Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 173 N.W.2d 369 (1969).
30. Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 323 N.W.2d 89 (1982).
31. NEB. REV. STAT. § 84-917(1) (Reissue 1994)(emphasis added).
32. *Id.* § 84-917(2)(a)(emphasis added).
33. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 340, 543 N.W.2d 715, 719 (1996); Downer v. Ihms, 192 Neb. 594, 599, 223 N.W.2d 148, 151 (1974).
34. Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 451, 323 N.W.2d 89, 91 (1982).
35. Downer v. Ihms, 192 Neb. 594, 600, 223 N.W.2d 148, 151 (1974).
36. Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 24-25, 173 N.W.2d 369, 371 (1969).
37. NEB. REV. STAT. § 84-901 (Reissue 1994).

it to the courts to adopt a definition.[38] Indeed, the statute points to definitions provided in the various cases. As the cases show, different proceedings have been accepted as adjudicated hearings. Part of the difficulty in defining an adjudicated hearing is that administrative agency actions do not always fall into neat legal categories. When an administrative agency acts in its quasi-judicial capacity, it may be conducting hearings, fact-finding operations, board meetings, rule-making, appeal processes, etc.

Black's Law Dictionary defines administrative actions as adjudicatory in character when they culminate in a final determination affecting personal or property rights.[39] But this definition implies a final decision by the agency. The jurisdictional test adopted by the Nebraska Supreme Court in some cases specifically avoids placing jurisdiction where the final decision is made. The term "hearing" has a fairly common meaning as a proceeding with a fact finder who evaluates evidence and witnesses from both sides and then issues a decision. In administrative proceedings, the hearing can be even less formal, involving only an individual who presents her case to a decision maker.

The first element of the test, an adjudicated hearing, is troublesome to identify in *Metro*. While the officer in *Metro* unquestionably conducted a hearing, was it actually an adjudicated hearing? The decision was not final. In fact, the officer made no decision, only findings of fact and a recommendation.[40] The Commissioner arguably made the adjudicatory/final decision in Lincoln. In *Metro,* the court did not discuss whether the decision by the Commissioner satisfied the jurisdictional requirements because the test identifies only the *first* site that met the jurisdictional requirements; once a site satisfies the jurisdiction requirements, no further finding is required. The *Metro* court held that the first adjudicated hearing occurred in Omaha.[41] If the word "adjudicated" was used in its traditional meaning, though, it is not immediately clear how the hearing officer's work in Omaha was adjudicatory in nature.

The second part of the jurisdiction test requires the presence of a disputed claim. Like the phrase "adjudicatory hearing," neither the cases nor statutes provide a precise definition for the term "disputed claim." Section 84-917(1) refers to a "contested case." The definition for a "contested case" is contained elsewhere in the Act.[42] While the term "a disputed claim" arguably could be a synonym for the term "a

38. *See supra* note 9 and accompanying text.
39. BLACK'S LAW DICTIONARY 26 (6th ed. 1991).
40. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 341, 543 N.W.2d 715, 719 (1996).
41. *Id.* at 341, 543 N.W.2d at 720.
42. NEB. REV. STAT. § 84-901(3) (Reissue 1992).

contested case," there is no clear basis for making such an assumption.

The term "disputed claim" does have commonplace meaning. "Dispute" means a conflict, and a "claim" is a cause of action.[43] In *Metro*, the supreme court held that an adjudicated hearing of a disputed claim took place in Omaha. If one considers the situation, however, what claim was the hearing officer asserting against Metro? Obviously, the purpose of the hearing and investigation was to decide the employment status of the carpenters. But the actual claim against Metro Renovation was made by the Department of Labor in Lincoln when it found the company liable for unpaid unemployment insurance premiums.[44] The Omaha hearing could be characterized as follows: the officer claims the carpenters were employees; the company claims they were not. There was obviously a dispute between Metro Renovation and the Department of Labor regarding the carpenters. Logically, though, the Department could make no claim against Metro Renovation until after the hearing. The hearing, as the court pointed out, provided the basis for the Department's claim against Metro Renovation.[45]

The court seemed to use this line of reasoning in *Keya Paha* when it noted that the initial denial of the tuition payments by the school board in Keya Paha did not confer jurisdiction—it was merely a request that the board refused, not a cause of action. No adjudicated hearing of a disputed claim occurred until the tuition question was decided by the State Department of Education in Lincoln.[46] In *Metro*, however, the court held that the action was taken in Omaha at the fact-finding hearing. Therefore, the Douglas County District Court had jurisdiction over the matter and the case was properly filed.[47]

IV. THE MODEL ADMINISTRATIVE PROCEDURE ACT

In 1945, Nebraska adopted the Administrative Procedure Act. Section 84-917 was enacted in 1963, two years after the National Conference of Commissioners on Uniform State Laws issued its first revision of the Model Administrative Procedure Act.[48] Various forms of the Model Act are used today in 28 states, including Nebraska.[49] The lan-

43. BLACK'S LAW DICTIONARY 169, 327 (6th ed. 1991).
44. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 338-39, 543 N.W.2d 715, 718 (1996).
45. *Id.* at 341, 543 N.W.2d at 719.
46. Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 452-54, 323 N.W.2d 89, 92 (1982).
47. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 341-42, 543 N.W.2d 715, 719-20 (1996).
48. CIVIL PROCEDURE AND REMEDIAL LAWS, 15 U.L.A. 137 (1990). The original Model Act was adopted in 1946.
49. *Id.*

guage addressing jurisdiction in the 1961 version of the Model Act provides as follows: "[P]roceedings for review are instituted by filing a petition in the [District Court of the _____ County]."[50] The 1961 version provided little direction on how to delimit jurisdiction other than to imply that the state could choose the district court where jurisdiction would lie. While legislators in Nebraska simply could have designated the Lancaster County District Court as the site for all administrative appeals, they chose not to do so. Designating Lincoln as the central repository for administrative appeals would have imposed a heavy burden on a plaintiff not located in the southeast portion of Nebraska. Section 84-917(2)(a) simply left unaddressed the possibility that agency procedures could provide for tiers of decision-making that could lead to various "actions" taken by the agency.

In 1981, the National Conference of Commissioners on Uniform State Laws passed another revision of the Model Administrative Procedure Act. The 1981 version reflects the increasing complexity of state administrative law. The Conference made two significant changes regarding jurisdiction over appeals. First, the revised jurisdiction statute designates a particular level of court to have jurisdiction over administrative appeals, usually the district level courts or the appellate level courts.[51] Then, the particular court with authority to review the case is designated as the court with venue.[52] Venue, according to the Model Act, can be in the district where the state capital is located, the district where the petitioner resides, or the district where the petitioner maintains its place of business.[53]

The differentiation between jurisdiction and venue is key. If the statute gives all district level courts jurisdiction over administrative appeals and then limits the proper venue to one particular district court, all courts have authority to transfer an administrative appeal brought in the wrong district court to the correct court. In short, all district courts would have subject matter jurisdiction. As a general proposition, however, if the statute confers jurisdiction in its entirety to one particular district court, as does the Nebraska statute, then any other district court lacks authority to do anything but dismiss the case. This creates a one-way ticket, no returns, and no transfers policy for administrative appeals.

As applied in Nebraska, section 84-917(2)(a) confers jurisdiction to only one district court, the district court where the action was taken. If the right to bring an administrative appeal rests solely in section

50. MODEL STATE ADMIN. PROCEDURE ACT § 15(b), 15 U.L.A. 301 (1961)(amended 1990).

51. MODEL STATE ADMIN. PROCEDURE ACT § 5-104(a), 15 U.L.A. 113 (1981)(amended 1990).

52. *Id.* § 5-104(b).

53. *Id.*

84-917, then the authority of the court to transfer an administrative appeal either must exist in that statute or be incorporated in section 84-917 by reference. The legislature has granted no such power to Nebraska district courts. As the court noted in *Keya Paha*, "'[t]he requirements of the statute are mandatory and must be complied with *before* the appellate court acquires jurisdiction of the subject matter of the action.'"[54] If a party raises jurisdiction as an issue even before trial, and the court finds that the case should have been brought in a different district, the court technically acts outside of its statutory authority by transferring the case.

The Nebraska Supreme Court has not had the opportunity to directly address the district court's power to transfer an administrative appeal. The Missouri Court of Appeals, however, dealt with the court's power to transfer an administrative appeal in *Pool v. Director of Revenue*.[55] In *Pool*, the petitioner appealed an administrative decision to suspend the petitioner's driver's license after he was convicted of driving while intoxicated. The controlling statute dictated that "'[t]he petition [for trial de novo] shall be filed in the circuit court of the county where the arrest occurred.'"[56] The petitioner filed his appeal in Jackson County, but the arrest occurred in Clay County. The Jackson County Court transferred the case to Clay County. The Clay County Court then reversed the suspension and the state agency appealed. The court of appeals vacated the trial court's decision, noting that Jackson County Court had no authority to transfer the case.[57] Rather, the Jackson County Court could only dismiss the case, leaving the plaintiff to file again in the proper court, assuming the time for appeal had not run.

The court explained that "[v]enue is a different thing from jurisdiction. Venue has to do with the place of the proceeding, not with *the power of the court to act*."[58] The court held that the statute did not authorize the Jackson County Court to transfer the case to Clay County because the statute was jurisdictional in nature. Thus, the transfer was unauthorized and void.

Other state courts have grappled with this issue. The Illinois Court of Appeals reached the same conclusion as the Missouri court. In *County of Coles v. Property Tax Appeal Board*,[59] the plaintiff mistakenly filed his appeal in the circuit court when the Illinois statute

54. Board of Educ. of Keya Paha County High Sch. Dist. v. State Bd. of Educ., 212 Neb. 448, 454, 323 N.W.2d 89, 92 (1982)(emphasis added)(quoting Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 25, 173 N.W.2d 369, 371-72 (1969)).
55. 824 S.W.2d 515 (Mo. Ct. App. 1992).
56. *Id.* at 516 (quoting Mo. REV. STAT. § 302.535 (1986)).
57. *Id.* at 516-17.
58. *Id.* at 517 (emphasis added).
59. 657 N.E.2d 673 (Ill. App. Ct. 1995).

required that the case be brought in the appellate court. The court noted that "[u]nfortunately, there is no mechanism for the transfer of an action for administrative review when it is wrongly filed."[60] The state of Iowa has resolved this problem by specifically empowering any court, in the interest of justice, to transfer a petition for administrative review to another court.[61]

V. THE CONSTITUTIONALITY OF NEBRASKA'S STATUTORY SCHEME

Because administrative decisions can and do operate to deprive citizens of property (as in a tax assessment) or liberty (as in a mental health confinement proceeding), the administrative process must satisfy procedural due process standards. Both the United States Constitution and the Nebraska Constitution guarantee citizens the right to due process of law before the deprivation of life, liberty, or property.[62] Most often in administrative law, procedural due process focuses on the inner workings of the administrative process, but this Note focuses on the judicial review process.[63] The two basic elements of procedural due process include notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*[64] provides the oft-quoted definition of procedural due process: Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... The notice must be of such nature as reasonably to convey the required information ...."[65]

In an administrative appeal, procedural due process means the petitioner must have notice, which is provided by statute, and an opportunity to be heard, which is provided by district court review. A plaintiff will lose her right to be heard, however, if she fails to comply with statutory requirements necessary to invoke the court's jurisdiction of the appeal. Under this circumstance, the individual's due pro-

60. *Id.* at 676.

61. "When a proceeding for judicial review has commenced, a court may, in the interests of justice, transfer the proceeding to another court where venue is proper." IOWA CODE § 17A.19(2) (1995).

62. U.S. CONST. amend. XIV, § 2; NEB. CONST. art. I, § 3.

63. A separate question exists. If the agency has satisfied due process prior to the judicial review, must the judicial review still meet due process standards? For the purposes of this Note, the assumed answer is yes. It is ironic that judicial review of agency decisions was motivated in the 1940's by the concern that agencies themselves might deprive citizens of due process. The current procedure seems to give the aggrieved citizen a double dose of due process. For a Nebraska case that arguably holds only one "dose" of due process is required, see *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972).

64. 339 U.S. 306 (1950).

65. *Id.* at 314 (citing Grannis v. Ordean, 234 U.S. 385 (1914)).

cess right is not violated. For example, if the statute requires that the petition be brought within thirty days of a final decision, the plaintiff who waits 31 days has lost the right to be heard. Notice to the plaintiff here is adequate and reasonable. She has thirty days and no more. This is why the petitioner in *Downer* arguably was not deprived of due process, even though he lost the opportunity to be heard. The statute clearly required Downer to file a copy of the record of the administrative proceedings with the court within thirty days after filing the action, and the plaintiff failed to do so.[66]

The jurisdictional requirement of section 84-917(2)(a), however, does not give clear notice to the plaintiff. Section 84-917(2)(a) instructs the plaintiff to file "in the district court of the county where the action was taken" without specifying the requisite action.[67] The Nebraska Supreme Court's interpretation of the "action taken" tells the plaintiff to file in the district where "the first adjudicated hearing of a disputed claim" took place.[68] The application of this standard as seen in *Metro*, *Downer*, *Flamingo*, and *Ihms* fails to provide clear notice of where to file the appeal and thus does not afford procedural due process.

For example, consider the *Metro* jurisdiction test as applied to an actual complaint brought by Walter Bray, a prison inmate.[69] On February 22, 1996, which was a few weeks after *Metro* was decided, Bray was arrested by the Omaha Police Department for intoxication in violation of rules governing prisoner release. Bray was on a nine hour pass from the Omaha Correctional Center to look for work. Pursuant to the Department of Correctional Services' disciplinary rules, a preliminary hearing was held on February 18, 1996, to determine whether to bring disciplinary proceedings against Bray. The preliminary hearing was held at the Omaha Correctional Center. As a result of the preliminary hearing, Correctional Services conducted an investigation. On February 28, a disciplinary committee hearing convened at the Omaha facility. Bray testified at the hearing, and the investigating officer introduced evidence from the Omaha Police Department. The committee found Bray guilty of escape, unlawful activity, and intoxication and sentenced him accordingly. The committee recorded its findings and decision in a disciplinary committee action sheet.

Bray appealed the committee's decision to the Department of Corrections Appeals Board, located in Lincoln, Nebraska. The Appeals

66. Downer v. Ihms, 192 Neb. 594, 601-02, 223 N.W.2d 148, 152 (1974).
67. NEB. REV. STAT. § 84-917(2)(a) (Reissue 1992).
68. Metro Renovation, Inc. v. Department of Labor, 249 Neb. 337, 341, 543 N.W.2d 715, 719 (1996).
69. Bray v. Department of Corrections, No. 541-3 (D. Lancaster County filed July 17, 1996).

Board reversed the conviction for intoxication because the Omaha Police Department failed to test Bray's blood alcohol level while he was in custody. The Board affirmed the other two convictions. Bray then filed an appeal under section 84-917 in Lancaster County District Court. Did Bray file in the correct court?

To determine where jurisdiction is proper, one must look first to see if the Department of Correctional Services is governed by statutes or regulations that set forth where an appeal for judicial review can be filed. If so, the requirements under section 84-917(2) are inapplicable.[70] In Bray's case, however, the Department defers to the Administrative Procedure Act to establish the method of review.[71] Thus, Bray must determine where the first adjudicated hearing of a disputed claim took place. For many litigants, this is a straightforward question if all agency activity occurred within one district. Such was the case in *Flamingo*.[72] In Bray's case, as in *Metro*, the agency's activity is divided between two districts. Thus, Bray's choice is either Douglas County District Court, where the preliminary hearing and disciplinary committee hearing took place, or Lancaster County District Court, where the Appeals Board hearing took place.

In *Metro*, the agency activity involved a hearing and investigation in Omaha, and a final decision in Lincoln. While there was some underlying ambiguity in *Metro* regarding whether the hearing was an actual adjudication and whether the hearing involved a disputed claim, the situation in Bray's case seems much clearer: Bray's disciplinary committee hearing appears to satisfy every element of the *Metro* test. It was an adjudicatory hearing. At its conclusion, the committee decided the charges against the accused. The committee sat as fact-finder and judge, heard evidence from both sides, and issued a decision. The hearing involved a disputed claim insofar as the Department prosecuted Bray for violating the disciplinary rules of the facility, and Bray defended himself against the claim. The committee hearing was the first such adjudicated hearing. If Bray's case is intended to prove that the *Metro* rule does not give proper notice, it seems to prove the opposite. The *Metro* test purports to place jurisdiction in Omaha at the Douglas County District Court.

Bray, however, filed his appeal in Lancaster County District Court, where the appeal's committee decided Bray's internal appeal. The Lancaster County District Court believed jurisdiction was instead proper in Douglas County because the "action taken" was the disciplinary hearing conducted in Omaha. The court transferred Bray's case

70. "The review provided for by this section shall not be available in any case where other provisions of law prescribe the method of appeal." NEB. REV. STAT. § 84-917(7) (Reissue 1992).

71. Reed v. Parratt, 207 Neb. 796, 301 N.W.2d 343 (1981).

72. Flamingo, Inc. v. Nebraska Liquor Comm'n, 185 Neb. 22, 173 N.W.2d 369 (1969).

to Douglas County.[73] The Lancaster County District Court's decision to transfer Bray's appeal was the incorrect procedural action, however. As discussed above, if the proper place to file was the Douglas County District Court, then the Lancaster County District Court lacked jurisdiction over Bray's appeal. Without jurisdiction, the Lancaster County District Court had no authority to transfer the appeal. The proper action would have been to dismiss Bray's appeal.[74] This procedural quandry was not questioned in Bray's appeal, however, because the issue was not raised. Thus, the case was resolved in Douglas County. Nevertheless, as section 84-917(2)(a) is written, administrative appeals are a one-way ticket to the district court where the action was taken. Period. Thus, if Douglas County District Court had jurisdiction over Bray's appeal (and Lancaster County District Court lacked jurisdiction), then the Lancaster County District Court's action to transfer Bray's case was void. Bray's appeal should have been dismissed, leaving Bray to file in Douglas County District Court within the prescribed time.

Setting aside the issue of transfer, at least a colorable argument can be made that the Lancaster County District Court had jurisdiction over Bray's appeal and therefore Bray properly filed his appeal. One could assert that the first adjudicated decision of a disputed claim must also qualify as a final decision because section 84-917 refers to the need for a final decision in subsection one and subsection two.[75] One could also assert that the disputed claim Bray raises on appeal is the decision by the Appeals Board to uphold two of his convictions, not the disciplinary committee's earlier decision.[76]

Moreover, the phrase "where the action is taken" is vague enough that a court reasonably could assign jurisdiction of Bray's appeal to either Douglas or Lancaster County District Court. Simply relying upon the court's initiative to transfer a case to the court with jurisdiction fails to resolve the ambiguity in the statute because section 84-917(2)(a) does not confer this authority to a court lacking jurisdiction. Dismissal is the only appropriate action under the statute. Thus, section 84-917(2)(a) does not "reasonably . . . convey the required information"[77] to instruct an individual where to properly file an administrative appeal, even with the guidance of the *Metro* test. The statute provides inadequate notice to afford procedural due process to those pursuing judicial review of administrative rulings.

73. Bray v. Department of Corrections, No. 541-3 (D. Lancaster County filed July 17, 1996)(transferred July 29, 1997, to Douglas County)
74. Pool v. Director of Revenue, 824 S.W.2d 515, 516-17 (Mo. Ct. App. 1992); County of Coles v. Property Tax Appeal Bd., 657 N.E.2d 673 (Ill. App. Ct. 1995).
75. NEB. REV. STAT. § 84-917 (1)-(2) (Reissue 1992).
76. See *supra* note 45 and accompanying text for a discussion of what constitutes a disputed claim.
77. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

As a policy consideration, applying the *Metro* rule to Bray's case may have one of two undesirable results. First, the Department could conduct all disciplinary committee hearings in Lancaster County, which would require the additional time and expense of transporting a prisoner in Omaha to Lincoln for the hearing. Or, the Department could defend these administrative appeals in both jurisdictions, which also would require additional time and expense. Second, it could be argued that the *Metro* rule will have a restrictive effect on all state agencies. Agencies will be motivated to conduct activities exclusively in Lancaster County to avoid the cost of litigating outside the state capital. This in turn would impose a tremendous cost on the residents of Nebraska who do not live in the southeast section of the state.

VI. HOW TO RESOLVE THE PROBLEM OF THE ONE-WAY TICKET

Several possible solutions may solve the problem of the one-way ticket policy of section 84-917(2)(a). As the statute itself notes, administrative agencies are free to adopt their own specific procedures for judicial review.[78] For example, the Motor Vehicle Safety Responsbility Act (MVRSA) governs appeals of any order or act of the Department of Motor Vehicles. Pursuant to section 60-503 of the Nebraska Code, jurisdiction of an appeal from a MVRSA decision rests with the district court where the petitioner resides or, if the petitioner is a nonresident, in the Lancaster County District Court.[79] In fact, the statute expressly renounces the procedures set forth in the Administrative Procedure Act.[80] A petitioner can understand and comply with the jurisdictional requirements for administrative appeals brought under section 60-503 without difficulty. This solution is piecemeal, however. The Administrative Procedure Act is designed to provide minimum standards for state agencies,[81] and those minimum standards should pass constitutional muster.

As noted previously, the statute could be amended to authorize district courts to transfer administrative appeals to the court with jurisdiction to hear the case.[82] This solution could solve the constitutional problem. The litigant would not necessarily be denied her day in court because of a jurisdictional requirement that provides inadequate notice. In cases similar to the facts of *Keya Paha* or *Downer*, the Nebraska Supreme Court could remand the case to the district court with instructions to transfer the case to the proper district court. While somewhat more tenable, this would still be a very costly and

78. NEB. REV. STAT. § 84-917(1) (Reissue 1992).
79. *Id.* § 60-503(1) (1995).
80. *Id.* § 60-503(2).
81. *Id.* § 84-915.01 (Reissue 1992).
82. *See supra* note 60 and accompanying text.

frustrating solution for all involved. Empowering the courts to transfer an administrative appeal would not solve the practical problem, faced by litigants and judges alike, of determining where the appeal should be filed in the first place.

The Arkansas legislature dealt with the problem of determining jurisdiction in the following manner:

> Proceedings for review shall be instituted by filing a petition, within thirty (30) days after service upon petitioner of the agency's final decision, in:
> A) The circuit court of the county in which the petitioner resides or does business; or
> B) The Circuit Court of Pulaski County, [where the state capital is located].[83]

This statute follows the suggested form of the 1981 Model Administrative Procedure Act, but does not confer subject matter jurisdiction to all district courts.[84] This means that although Arkansas agencies may have to travel outside Pulaski County to litigate appeals, the plaintiff cannot arbitrarily select a court. Making the jurisdictional requirements similar to venue requirements also reduces the likelihood that citizens in more remote sections of the state will be subject to traveling distances disproportionate to those who live in more populous areas.[85] Admittedly, it is much more convenient and cost effective for the state to litigate all administrative appeals in the judicial district of the state capital. Most, if not all, agencies and agency attorneys are headquartered in the state capital. State agencies, however, are better equipped to deal with travel costs than are individual litigants. Telephonic hearings can be used to reduce costs, particularly to individual litigants, because state agencies have better resources to initiate telephonic judicial hearings than do individual litigants.

The best way to resolve the difficulties of the *Metro* jurisdictional rule is to revise section 84-917(2)(a) to read as follows: Proceedings for review shall be filed in the District Court of Lancaster County, or in the district court of the county where the petitioner resides, or in the district court of the county where the petitioner has his or her principal place of business. This rule would allow Bray to file his appeal in Lancaster County District Court without worrying about whether jurisdiction arises out of the Omaha hearing or the Lincoln Appeals Board decision. Such statutory construction would eliminate the need to analyze the discrete elements of what the fact-finder did in Omaha and what the Commissioner did in Lincoln to determine the site of the first adjudicated hearing in a disputed claim. In other words, it would be unnecessary to analyze multiple levels of agency procedures to de-

83. ARK. CODE ANN. § 25-15-212(b)(1)(A)-(B) (Michie 1995).
84. MODEL STATE ADMIN. PROCEDURE ACT § 5-104(b), 15 U.L.A. 113 (1981)(amended 1990).
85. Compelling litigants to travel to a distant, inconvenient forum raises due process questions as well, but such questions are beyond the scope of this Note.

termine the proper "action" that confers jurisdiction. For example, the proposed statute would allow the Keya Paha School District to file its appeal in the Keya Paha District Court; Metro Renovation could appeal in either Douglas or Lancaster County District Court.

In short, such a change would provide procedural due process to the litigants and promote judicial economy in the courts. Perhaps the Nebraska legislature will consider such a revision at its next opportunity.

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